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State of New York Public Employment Relations Board Decisions from October 15, 2013

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from October 15, 2013

Keywords

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**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

-and-

CASE NO. C-6200

TOWN OF ISLIP,

Employer,

-and-

**CITY EMPLOYEES UNION LOCAL 237, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,**

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the United Public Service Employees Union has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their

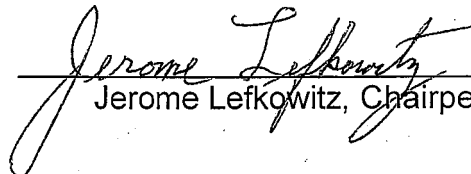
exclusive representative for the purpose of collective negotiations and the settlement of grievances.


Included: All regular full-time white collar workers as set forth in the attached Schedule A.

Excluded: Elected or appointed officials, department heads, deputies, designated confidential employees, part-time employees, seasonal employees and temporary employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Public Service Employees Union. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: October 15, 2013
Brooklyn, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member

SCHEDULE A
GRADE

TITLE

9	Account Clerk
9	Account Clerk Typist
14	Administrative Aide
16	Administrative Assistant
14	Adult Day Care Program Supervisor
16	Airport Administrative Assistant
18	Airport Administrative Supervisor
10	Airport Identification Technician
14	Alcoholism Counselor
14	Alcoholism Counselor - (Spanish Speaking)
11	Animal Health Technician
14	Architectural Drafter I
18	Architectural Drafter II
8	Assessment Aide
11	Assessment Assistant
6	Assessment Clerk
16	Assistant Architect
16	Assistant to Assessor
18	Assistant Civil Engineer
8	Assistant Cook
17	Assistant Federal & State Aid Claims Coordinator
16	Assistant Federal & State Aid Coordinator
16	Assistant Intergovernmental Relations Coordinator
10	Assistant Recreation Leader
10	Asst. Senior Citizen Center Manager
14	Assistant Site Plan Reviewer
16	Assistant to Town Tax Receiver
18	Assistant Waterways Management Supervisor
14	Bay Management Specialist I
15	Bay Management Specialist II
16	Bay Management Specialist III
12	Budget Assistant
16	Budget Technician
14	Building Inspector
18	Building Permits Coordinator
16	Building Plans Examiner
16	Case Manager
16	Case Manager - (Spanish Speaking)
11	Caseworker
10	Caseworker Trainee
10	Cashier
17	Chief Fire Marshall
6	Clerk
6	Clerk Typist
6	Clerk-Typist (Spanish Speaking)
12	Community Development Assistant
13	Community Development Program Technician
12	Community Development Specialist
11	Community Relations Assistant
16	Community Relations Specialist

GRADE	TITLE
8	Community Service Aide
5	Community Service Worker
11	Computer Operator I
13	Computer Operator II
15	Computer Operator III
17	Computer Programmer
16	Computer Programmer Trainee
12	Computer Technician
16	Contracts Examiner
14	Contract Technician
10	Cook
18	Coordinator of Alcoholism Services
15	Cultural Affairs Supervisor
6	Data Entry Operator
10	Data Processing Equipment Operator
10	Drafter I
12	Drafter II
16	Drug Abuse Educator
14	Drug & Alcohol Community Coordinator I
14	Drug & Alcohol Counselor I
14	Drug & Alcohol Counselor I (Spanish Speaking)
16	Drug & Alcohol Counselor II
14	Drug & Alcohol Hotline Coordinator
17	Employees Assistance Program Coordinator
10	Engineering Aide
11	Engineering Inspector
7	Environmental Aide
15	Environmental Analyst
7	Environmental Assistant
15	Environmental Planner
10	Environmental Technician
12	Environmentalist I
16	Environmentalist II
13	Fire Marshall I
15	Fire Marshall II
6	Food Service Worker
17	Graphics Materials Designer
18	Graphics Supervisor
18	Head Clerk
14	Health Financial Analyst
8	Home Health Aide
16	Hotline Coordinator
12	Housing Inspector
13	Industrial Development Assistant
11	Legal Stenographer
11	Lighting Inspector
6	Mail Clerk
14	Map Drafter I
9	Micrographics Operator
8	Museum Restoration Specialist

GRADE	TITLE
11	Neighborhood Aide
12	Network Communication Specialist
18	Network & Systems Coordinator
12	Ordinance Inspector
8	Paralegal Assistant
11	Park Interpretive Specialist
18	Payroll Supervisor
12	Photographer
14	Planner
12	Planner Trainee
14	Planner-Youth Services
12	Planning Aide
12	Plumbing Inspector
14	Principal Account Clerk
12	Principal Assessment Clerk
18	Principal Building Inspector
12	Principal Clerk
12	Principal Data Entry Operator
14	Principal Engineering Aide
16	Principal Housing Inspector
18	Principal Planner
12	Principal Stenographer
16	Principal Zoning Inspector
16	Real Property Appraiser II
6	Recreation Aide
12	Recreation Center Manager
11	Recreation Leader
16	Recreation Program Coordinator
8	Recreation Specialist
14	Recreation Supervisor
14	Sanitation Inspector
14	Sanitation Inspector (Spanish Speaking)
14	Secretarial Assistant
12	Senior Account Clerk
18	Senior Administrative Assistant
13	Senior Assessment Assistant
9	Senior Assessment Clerk
16	Senior Building Inspector
18	Senior Case Manager
9	Senior Cashier
6	Senior Citizen Aide
12	Senior Citizen Center Manager
10	Senior Citizen Club Leader
12	Senior Citizen Nutrition Center Manager
16	Senior Citizen Program Supervisor
18	Senior Civil Engineer
9	Senior Clerk
9	Senior Clerk Typist
8	Senior Data Entry Operator
16	Senior Drug Abuse Educator
12	Senior Engineering Aide

GRADE	TITLE
12	Senior Engineering Inspector
18	Senior Environmental Analyst
17	Senior Environmental Planner
14	Senior Housing Inspector
13	Senior Lighting Inspector
12	Senior Mail Clerk
12	Senior Micrographics Operator
18	Senior Micrographics Technician
14	Senior Neighborhood Aide
16	Senior Planner
14	Senior Plumbing Inspector
18	Senior Program Analyst
11	Senior Recreation Leader
12	Senior Sanitation Inspector
12	Senior Sign Inspector
9	Senior Stenographer
12	Senior Tax Cashier
14	Senior Zoning Inspector
10	Sign Inspector
18	Site Plan Reviewer
7	Stenographer
18	Surveyor
6	Switchboard Operator
10	Switchboard Supervisor
18	Systems Analyst
18	Systems Programmer
10	Tax Cashier
13	Telecommunications Specialist
12	Telecommunications Technician
15	Traffic Engineer I
17	Traffic Engineer II
18	Traffic Engineer III
10	Traffic Technician I
12	Traffic Technician II
14	Traffic Technician III
12	Volunteer Program Coordinator
17	Youth Services Program Coordinator
15	Youth Services Specialist
12	Zoning Inspector
12	Zoning Inspector (Spanish Speaking)

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

- and -

CASE NO. C-6201

ISLIP RESOURCE RECOVERY AGENCY,

Employer,

-and-

**CITY EMPLOYEES UNION LOCAL 237, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS.**

Intervenor.

**KOEHLER & ISAACS, LLP (LIAM L. CASTRO, ESQ., of counsel), for
Petitioner**

ROBERT L. CICALÉ, ESQ., for Employer

ERIC M. HOFMEISTER, for Intervenor

BOARD DECISION AND ORDER

On May 31, 2013, the United Public Service Employees Union (petitioner) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition seeking certification as the exclusive representative of certain employees of the Islip Resource Recovery Agency (employer).

Thereafter, the parties executed a consent agreement in which they stipulated

that the following negotiating unit was appropriate:

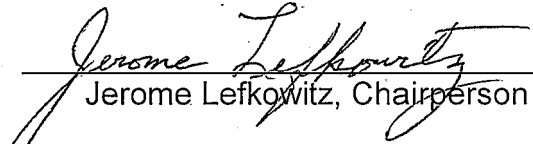
Included: All full-time drivers, loaders, foreman, mechanics and assistant mechanics.


Excluded: All other employees.

Pursuant to that agreement, a secret-ballot election was held on September 18, 2013, at which a majority of ballots were cast against representation by the petitioner.

Inasmuch as the results of the election indicate that a majority of the eligible voters in the unit who cast ballots do not desire to be represented for the purpose of collective negotiations by the petitioner, the incumbent remains the exclusive representative of the unit employees and IT IS ORDERED that the petition is dismissed.

DATED: October 15, 2013
Brooklyn, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

DAVID BARNARD,

Petitioner;

-and-

CASE NO. C-6199

**COUNTY OF ONTARIO AND ONTARIO COUNTY
SHERIFF'S OFFICE,**

Employer,

-and-

**CIVIL SERVICE EMPLOYEES ASSOCIATION,
INC., LOCAL 1000, AFSCME, AFL-CIO,**

Intervenor.

DAVID BARNARD, for Petitioner

JOHN W. PARK, ESQ., for Employer

STEVEN A. CRAIN, GENERAL COUNSEL, for Intervenor

BOARD DECISION AND ORDER

On May 27, 2013, the David Barnard (petitioner) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition for decertification of the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (intervenor), the current negotiating representative for employees in the

following negotiating unit:

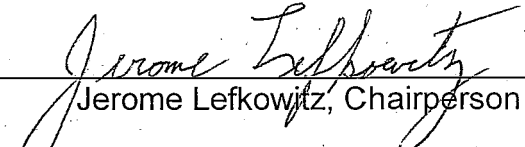
Included: All full-time employees and all regularly scheduled part-time employees within the same titles in the Ontario County Sheriff's Department.


Excluded: Sheriff, undersheriff, chief deputy sheriff, lieutenants, chief correction officer, chief dispatcher, nursing director correctional facility, senior stenographer/secretary to the sheriff, county police officers, county police sergeants, investigators, seasonal employees.

Upon consent of the parties, a mail ballot election was held on September 27, 2013. The results of the election show that a majority of eligible employees in the unit who cast valid ballots no longer desire to be represented for purposes of collective negotiations by the intervenor.

THEREFORE, IT IS ORDERED that the intervenor is decertified as the negotiating agent for the unit.

DATED: October 15, 2013,
Brooklyn, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

HELEN E. WEST,

Charging Party,

CASE NOS.

U-30848

U-31975

- and -

**UNITED FEDERATION OF TEACHERS, LOCAL 2,
AMERICAN FEDERATION OF TEACHERS,
AFL-CIO,**

Respondent,

- and -

**BOARD OF EDUCATION OF THE CITY
SCHOOL DISTRICT OF THE CITY OF NEW YORK,**

Employer.

HELEN E. WEST, *pro se*

**RICHARD E. CASAGRANDE, GENERAL COUNSEL (ORIANA VIGLIOTTI of
counsel), for Respondent**

**DAVID BRODSKY, DIRECTOR OF LABOR RELATIONS (SETH J. BLAU of
counsel), for Employer**

BOARD DECISION AND ORDER

These cases come to the Board on exceptions by Helen E. West (West) to decisions of an Administrative Law Judge dismissing improper practice charges in Case Nos. U-30848¹ and U-31975,² which alleged that the United Federation of Teachers,

¹ 45 PERB ¶4561 (2012).

² 46 PERB ¶4545 (2013).

Local 2, American Federation of Teachers, AFL-CIO (UFT) violated §§209-a.2(a) and (c) of the Public Employees' Fair Employment Act (Act) by failing to respond to her inquiries. UFT and the Board of Education of the City School District of the City of New York (District) oppose West's exceptions.

In our prior decision in Case No. U-30848, we denied a request by West for an extension of time to file exceptions pursuant to §213.4 of our Rules of Procedure (Rules) to the ALJ's decision dismissing the charge.³ We found that West had failed to articulate any facts to explain her extensive delay in making an application for an extension following receipt of the ALJ's decision. Based upon our earlier decision, we deny West's exceptions in Case No. U-30848 as untimely pursuant to §§213.2(a) and 213.4 of the Rules.

We also deny West's exceptions in Case No. U-31975. The ALJ in that case dismissed the charge on the ground that UFT did not have a continuing duty under the Act to represent West with respect to her inquiries made close to three years following her 2009 termination by the District.⁴ In her exceptions, West does not contest the ALJ's conclusion that UFT did not have a duty under the Act to provide her with representation. Instead, the exceptions are limited to challenging the merits of the decision in Case No. U-30848, and asserting new allegations that she is a whistleblower with certain physical and learning disabilities. The latter allegations were not included in

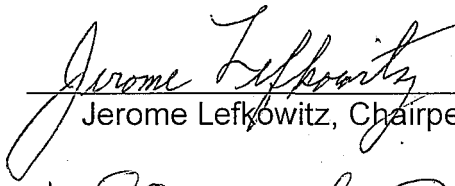
³ 46 PERB ¶13001 (2013).


⁴ See generally, *District Council 37, AFSCME (Maltsev)*, 41 PERB ¶13022 (2008)(setting forth and applying the standard under the Act concerning when an employee organization has a continuing duty to represent a former unit employee following separation from service.)

her charges, and our improper practice jurisdiction is limited to alleged violations of §209-a of the Act.⁵

Based upon the foregoing, we deny West's exceptions and affirm the ALJ's decision dismissing the charge in Case No. U-31975.

DATED: October 15, 2013
Brooklyn, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member

⁵ In the alternative, we would deny West's exceptions in Case No. U-31975 based upon her failure to comply with §213.2(a) of the Rules by filing proof that she served her exceptions upon UFT and the District.

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

NICHOLAS J. HIRSCH,

Charging Party,

-and-

CASE NO. U-29886

ROCHESTER TEACHERS ASSOCIATION,

Respondent,

-and-

ROCHESTER CITY SCHOOL DISTRICT,

Employer.

NICHOLAS J. HIRSCH, *pro se*

**RICHARD E. CASAGRANDE, GENERAL COUNSEL (HAROLD EISENSTEIN,
of counsel), for Respondent**

**CHARLES G. JOHNSON, GENERAL COUNSEL (BETHANY A. CENTRONE of
counsel), Employer**

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by Nicholas J. Hirsch (Hirsch) to a decision of an Administrative Law Judge (ALJ) dismissing an improper practice charge, as amended, alleging that the Rochester Teachers Association (RTA) violated §209-a.2(c) of the Public Employees' Fair Employment Act (Act) when it refused to arbitrate Hirsch's grievance challenging his discharge as a substitute teacher by the Rochester City School District (District).¹ The ALJ dismissed the charge based upon Hirsch's failure to prosecute as demonstrated by his defiant disregard of the ALJ's instructions despite prior warnings, his repeated refusal to proceed with the presentation

¹ Pursuant to §209-a.3 of the Act, the District is a statutory party to the charge.

of evidence, and his efforts to control the manner in which the hearing was conducted.²

In his exceptions, Hirsch alleges that the ALJ demonstrated bias and prejudice toward him throughout the hearing and denied him due process and equal protection. Hirsch asserts, *inter alia*, that the ALJ: denied his request for discovery; permitted a subpoenaed witness to testify out of order; engaged in *ex parte* communications with RTA's counsel about calling the witness out of turn; insisted he present evidence rather than argument during his testimony; refused to permit testimony to be read back for clarification; deprived him of the right to question a witness during direct examination; permitted RTA's counsel to repeatedly interrupt him and failed to warn or admonish RTA's counsel; and acted inappropriately by describing his behavior during the hearing in her decision. Hirsch also asserts that the ALJ's decision does not comply with our Rules of Procedure (Rules) because it purportedly includes false and defamatory statements. Finally, he asserts that he has been discriminated against as an indigent person in violation of his constitutional rights and that RTA violated §209-a.2(c) of the Act by failing to process his grievance to arbitration.

In support of his exceptions, Hirsch has submitted a DVD, which he asserts includes audio and videotape recordings of hearings held before the ALJ on June 12, 2012 and November 9, 2012 concerning his amended charge.³ Hirsch has also submitted handwritten notes by Marie J. Ruest (Ruest) along with an affidavit from her stating that her notes accurately reflect what took place during the hearings conducted

² 46 PERB ¶4506 (2013). We previously denied a motion by Hirsch for leave to file exceptions aimed at compelling the ALJ to issue a written decision following the conclusion of the hearing. *Rochester Teachers Assn (Hirsch)*, 45 PERB ¶3052 (2012).

³ Exceptions, ¶1(A)(1)(h); Exhibit A.

by the ALJ on August 11, 2011, June 12, 2012 and November 9, 2012.⁴

RTA supports the ALJ's decision and asserts that the surreptitiously created DVD recordings offered by Hirsch in support of his exceptions constitute misconduct because they prove that he violated the ALJ's instruction that the parties shall not record the hearing. The District has not filed a response to the exceptions.

Based upon our review of the record, and the parties' respective arguments, we deny Hirsch's exceptions.

PROCEDURAL HISTORY

At the commencement of the first day of hearing on August 11, 2011, the ALJ instructed the parties that the recording of the hearing was not permitted. Both Hirsch and the Association's counsel stated on the record that they understood the instruction.⁵ The ALJ also read into the record a prehearing ruling that defined the scope of Hirsch's amended charge based upon his previously filed offer of proof:

Based on the charge as amended, and Mr. Hirsch's letter of June 28, 2010, the charge is read to allege that the RTA violated its duty of fair representation to Mr. Hirsch in the manner in which it handled the grievance concerning his discharge. The charge asserts that the RTA refused to arbitrate Mr. Hirsch's grievance and ceased representing him without a valid reason, after processing the grievance through several stages of the grievance procedure. The charge further alleges that Mr. Hirsch has a right to pursue the grievance without the RTA's consent pursuant to the terms of the collective bargaining agreement.

⁴ Exceptions, Exhibit 5(a-c).

⁵ Transcript, p. 7. References in our decision to "Transcript" shall refer to the August 11, 2011 hearing transcript and references to "Transcript II" refers to the November 9, 2012 hearing transcript.

In his June 28, 2010 correspondence Mr. Hirsch also makes allegations against the District, including that it improperly terminated him and that it violated his rights under the collective bargaining agreement. PERB has no jurisdiction over that aspect of the complaint, and further, the charge as amended alleges violations of the Act only by the RTA. Thus the charge is being processed only as to the RTA.⁶

Before any witnesses were called to testify, the ALJ explained that the purpose of the hearing was to provide each party with an opportunity to present evidence concerning relevant facts, and ordered that any arguments premised on those facts and applicable case law be made in post-hearing briefs.⁷ Hirsch, however, took exception to the ALJ's ruling,⁸ and attempted to make argument throughout his testimony.⁹

The ALJ permitted Hirsch to testify in narrative form and to utilize his notes during his direct testimony.¹⁰ The ALJ also repeatedly encouraged him to speak slowly,¹¹ urged him to calm down,¹² granted him latitude to present background information about other grievances, permitted him to testify concerning his opinions about the District-RTA grievance procedure,¹³ and made arrangements for his exhibits

⁶ ALJ Exhibit 7; Transcript, pp. 9-10.

⁷ Transcript, pp. 12-15.

⁸ Transcript, pp. 14-15.

⁹ Transcript, pp. 55, 60-61, 62-64; Transcript II, pp. 17-19.

¹⁰ Transcript, pp. 23-24.

¹¹ Transcript, pp. 22, 33, 37, 43, 50, 79; Transcript II, pp. 10, 18, 20.

¹² Transcript, p. 192.

¹³ Transcript, pp. 60-63.

to be copied.¹⁴ In addition, the ALJ attempted to redirect Hirsch to testify about information directly related to his charge against RTA rather than claims of retaliation by the District that were not part of his charge.¹⁵ The ALJ also aided Hirsch by asking him at the initial close of his direct testimony whether he wanted his exhibits admitted into evidence.¹⁶ The ALJ, however, rejected Hirsch's attempt to admit into evidence a surreptitious audiotape that he asserted included the recorded content of a prehearing conference held before an ALJ regarding his charge.¹⁷

Prior to RTA's cross-examination of Hirsch, the ALJ permitted RTA to call a subpoenaed witness, the District's Director of Recruitment Narlene Ragans (Ragans), to testify out of order "because she has to get back to the district."¹⁸ At the time, Hirsch did not object to the accommodation extended to the witness.¹⁹

During her direct testimony, Ragans described the background to, and the events, at, a September 13, 2009 meeting she held with Hirsch and RTA representative Jonathan H. Hickey (Hickey) concerning written complaints received from different District schools about Hirsch's performance.²⁰ She also testified about Hirsch's attempt

¹⁴ Transcript, pp. 40-45.

¹⁵ ALJ Exhibit 7, Transcript, pp. 53, 69-70.

¹⁶ Transcript, p. 80.

¹⁷ Transcript, pp. 67-69.

¹⁸ Transcript, pp. 80-81. The record suggests that the courtesy granted to the subpoenaed witness was arranged during a brief recess. Transcript, p. 81.

¹⁹ Transcript, pp. 81. He did, however, express his objection when the hearing resumed on November 9, 2012. Transcript II, p. 11.

²⁰ Transcript, pp. 87-104; Union Exhibits 1, 2, 3.

to tape record the meeting,²¹ her ending the meeting because of Hirsch's behavior,²² and the District's decision to discharge him on February 27, 2009 for performance deficiencies.²³ During Hirsch's cross-examination of Ragans he threatened to "walk out the door" after the ALJ sustained an RTA evidentiary objection.²⁴ At the conclusion of his cross-examination, the ALJ denied Hirsch's motion to strike Ragans' testimony on relevancy grounds.²⁵ Following her testimony, RTA proceeded with its cross-examination of Hirsch. On cross-examination, Hirsch acknowledged RTA's prior successful representation of him after the District had terminated him in 2006.²⁶ Thereafter, Hirsch called Ruest to testify on his behalf. Ruest testified that during Hirsch's incarceration following his conviction for perjury, she communicated with RTA representative Hickey who told her that after Hirsch was released from jail, RTA would discuss resuming the arbitration.²⁷ Following Ruest's testimony, the ALJ permitted Hirsch to re-call himself as a witness.²⁸

On October 13, 2011, Hirsch filed a written motion asking the ALJ to recuse

²¹ Transcript, p. 104.

²² Transcript, pp. 101-106.

²³ Transcript, pp. 108-109; Union Exhibit 4.

²⁴ Transcript, p. 138.

²⁵ Transcript, pp. 150-153.

²⁶ Transcript, pp. 153-155, Charging Party Exhibit 2.

²⁷ Transcript, pp. 186-190. According to testimony at the hearing, Hirsch's conviction for perjury was overturned. Transcript II, p. 31.

²⁸ Transcript, pp. 204-206. Hirsch called Ruest to testify after his effort to have her affidavit admitted into evidence was denied. Transcript, pp. 55-57.

herself based upon her evidentiary and procedural rulings on the first day of hearing. In addition, he filed a motion requesting that he be permitted to proceed as a poor person.²⁹ The ALJ denied both motions.³⁰

A second day of hearing was conducted on June 12, 2012. Following the hearing, the private stenographer used by our agency to transcribe the hearing announced his retirement and stated that he was not able to produce a transcript from that hearing date. The ALJ advised the parties of the development, informed them that the second day of hearing would have to be repeated, and scheduled the hearing to resume on November 9, 2012. Prior to the resumption of the hearing, the Director of Public Employment Practices and Representation (Director) responded to a letter from Hirsch concerning the transcript. In his letter, the Director stated that the private stenographer had retired from his business and was not able to produce a transcript of his stenographic notes from the second day of hearing.³¹

When the hearing resumed on November 9, 2012, Hirsch was permitted to take the stand for purposes of continuing his direct testimony in narrative form. He was also permitted to recall Ruest to testify.

Prior to the resumption of Hirsch's testimony, he made a motion for discovery of the notes taken by RTA representative Hickey at the September 13, 2009 meeting with the District.³² After the motion was denied, Hirsch continued to argue with the ALJ;

²⁹ ALJ Exhibit 9.

³⁰ ALJ Exhibit 10.

³¹ Exceptions , Exhibit 3.

³² Transcript II, pp. 8-13.

resisting her efforts to have the hearing proceed in an orderly fashion.³³ During a colloquy, the ALJ placed Hirsch on notice that if he continued to ignore her instructions the hearing would be ended:

That's enough on this point. Now I'm going to caution you at this point, if you do not follow my instructions, we're stopping and this will go no further. Okay? Do you understand that? Just yes or no.³⁴

Despite repeated directives from the ALJ, Hirsch continued to utilize his direct testimony to make argument rather than present facts.³⁵ This led the ALJ to sustain objections from RTA's counsel and to order Hirsch to abide by her rulings.³⁶ She also had to direct Hirsch to sit down.³⁷

During the course of Ruest's testimony, the ALJ sustained an objection by RTA's counsel to a question concerning her expenses for attending the hearing.³⁸ According to Hirsch, the question was relevant to a notice of claim he had filed in connection with a planned lawsuit.³⁹ At another point, the ALJ overruled Hirsch's direction to the stenographer to read back the wording of an RTA evidentiary objection,⁴⁰ with the ALJ reiterating her authority over the conduct of the hearing. The ALJ also had to direct

³³ Transcript II, pp. 13-16.

³⁴ Transcript II, p. 16.

³⁵ Transcript II, pp. 17-26.

³⁶ Transcript II, pp. 26-27.

³⁷ Transcript II, pp. 27-28.

³⁸ Transcript II, pp. 32-33.

³⁹ Transcript II, p. 33.

⁴⁰ Transcript II, pp. 41-42.

Hirsch during the hearing to discontinue his outbursts:

I am telling you, one more outburst like that, we're stopping
This is not how a hearing is conducted. You don't argue with
counsel. You don't explode every time you hear something
you don't agree with.⁴¹

In response, Hirsch commenced an argument with the ALJ over the definition of
the word "explode":

Let's get the dictionary and look up explode.
If you want to say I'm exploding, then let's define that. I'm
not exploding –⁴²

As a result of Hirsch's unwillingness to abide by her directives, the ALJ ended the
hearing and informed the parties of her intention to dismiss the charge based upon
Hirsch's conduct.⁴³

DISCUSSION

We begin with Hirsch's request that we consider materials submitted in support
of his exceptions, which are outside of the record: a DVD that purportedly contains
audio and video recordings of the hearings held on June 12, 2012 and November 9,
2012; and the handwritten notes of Ruest along with her affidavit stating that the notes
accurately reflect what took place during the hearings conducted on August 11, 2011,
June 12, 2012 and November 9, 2012.

⁴¹ Transcript II, p. 43.

⁴² Transcript II, p. 43.

⁴³ Transcript II, p. 43.

Section 213.2 of the Rules limits our review of an ALJ's decision to the record that was before her or him.⁴⁴ Neither the DVD nor Ruest's notes and affidavit are part of the record considered by the ALJ and, therefore, we decline to consider them.

To the extent that Hirsch's representation that the DVD includes recordings from the June 12, 2012 and November 9, 2012 hearing dates is accurate, it constitutes evidence of misconduct under §212(j) of our Rules. The recording of the hearings violated the ALJ's clear and explicit order against such recordings. Even without the ALJ's ruling, we would find generally that the secret recording of a hearing and/or a prehearing conference in a case before our agency constitutes misconduct under §212(j) of our Rules warranting an appropriate sanction. In light of our decision below, however, we do not need to review the content of the DVD to determine whether it demonstrates misconduct warranting a sanction in this case.

Next, we consider Hirsch's claim that the ALJ demonstrated bias and prejudice, and denied him due process and equal protection. Following our review of the record, we find no support for his assertions. Indeed, the ALJ permitted him to testify in narrative form, allowed him to recall himself as a witness, repeatedly encouraged him to speak slowly and to calm down, redirected him to testify about information directly related to his charge, allowed him to testify concerning his opinions about the District-RTA grievance procedure, made arrangements for his exhibits to be copied, and ensured that his exhibits were admitted into evidence at the close of his initial direct testimony. In addition, we find no support for Hirsch's claim that the ALJ's decision

⁴⁴ CSEA (*Paganini*), 36 PERB ¶13006 (2003).

contains false and defamatory statements. Rather, it contains the ALJ's description of Hirsch's behavior during the hearing that is supported by the record.

The ALJ's denial of Hirsch's discovery request does not constitute a denial of due process and equal protection or demonstrate bias and prejudice.⁴⁵ Under the State Administrative Procedure Act §305, New York administrative agencies have the discretion to adopt procedural rules concerning pre-hearing discovery and our Rules do not mandate discovery by the parties.⁴⁶

Similarly, we reject Hirsch's exceptions premised upon the ALJ permitting RTA witness Ragans to testify out of order. Under our Rules, an ALJ is granted considerable discretion in the conduct of a hearing and in developing a full record.⁴⁷ The ALJ's decision to accommodate the schedule of the subpoenaed witness by permitting her to testify out of turn was well within the ALJ's discretion. Furthermore, Hirsch did not object to the ruling at the time the RTA witness testified, and the record establishes he had a full and fair opportunity to cross-examine the witness. Although Hirsch claims that the ALJ engaged in purported *ex parte* communications with RTA's counsel concerning the subpoenaed witness, there is nothing in the record to support that accusation.

⁴⁵ *UFT and Bd of Educ of the City Sch Dist of the City of New York (Jenkins)*, 41 PERB ¶3007 (2008), *confirmed sub nom. Jenkins v New York State Pub Empl Rel Bd*, 41 PERB ¶7007 (Sup Ct NY County 2008), *affd* 67AD3d 567, 42 PERB ¶7008 (1st Dept 2009), *app den*, 43 PERB ¶7003 (1st Dept 2010); *Rochester Teachers Assn (Falso)*, 45 PERB ¶3033 (2012) *confirmed sub nom Falso v New York State Pub Empl Rel Bd*, 46 PERB ¶7003 (Sup Ct Albany County 2013).

⁴⁶ *UFT (Tulloch)*, 45 PERB ¶3035 (2012).

⁴⁷ *Board of Educ of the City Sch Dist of the City of New York (Ruiz)*, 43 PERB ¶3022 (2010); *City of Elmira*, 41 PERB ¶3018 (2008).

We also reject Hirsch's exceptions premised upon the ALJ's evidentiary rulings, and her repeated efforts to maintain order and decorum during the hearing. The purpose of a lay witness testifying at a hearing is to present personal knowledge of relevant facts. The ALJ's repeated directives requiring Hirsch to set forth facts rather than make argument while testifying are fully consistent with applicable evidentiary rules and well within her discretion. Similarly, the other evidentiary rulings challenged by Hirsch, along with the ALJ's efforts to have him comply with her directives, were well within her discretion and do not constitute reversible error. Contrary to Hirsch's exceptions, RTA's counsel had a right to make evidentiary objections during Hirsch's testimony and those objections did not constitute misconduct warranting admonishment.

There is no evidence in the record to support Hirsch's claim that he was discriminated against as an indigent person. Although Hirsch's motion to proceed as a poor person was denied by the ALJ, it does not constitute proof of discrimination. Our Rules are silent regarding a procedure to seek poor person status. To the extent that we are obligated in a particular case to grant such status, New York's civil procedure rules provide guidance. To obtain permission to proceed as a poor person in state court, an individual must file an affidavit:

setting forth the amount and sources of his or her income and listing his or her property with its value; that he or she is unable to pay the costs, fees and expenses necessary to prosecute or defend the action or to maintain or respond to the appeal; the nature of the action; sufficient facts so that the merit of the contentions can be ascertained; and whether any other person is beneficially interested in any recovery sought and, if so, whether every such person is unable to pay such costs, fees and expenses.⁴⁸

⁴⁸ CPLR §1101(a).

In the present case, Hirsch's affidavit in support of his motion to the ALJ fails to set forth sufficient facts to demonstrate an entitlement to poor person status. The insufficiency of his application is supported by the prior denials made by the Appellate Division, Fourth Department concerning his motions seeking the same relief in unrelated litigation.⁴⁹

Finally, Hirsch did not file an exception to the ALJ's rationale for dismissing his charge: his defiant misbehavior during the hearing constitutes a failure to prosecute the charge. Therefore, that issue has been waived.⁵⁰ Even if Hirsch had filed such an exception, we would have affirmed the ALJ's decision based upon the totality of his conduct during the hearing. It is well-settled that the failure of a charging party to prosecute a charge is grounds for dismissal.⁵¹ In the present case, the totality of Hirsch's conduct during the hearing including his repeated refusal to abide by the ALJ's directives and his defiance of the ALJ's authority demonstrate an abuse of our procedures warranting dismissal of the charge.⁵²

⁴⁹ See, *Hirsch and Ruest v City of Rochester*, 2009 NY Slip Op 72900(U) (4th Dept 2009); *Hirsch v Sturgis*, 2010 NY Slip Op 76432(U) (4th Dept 2010); *Hirsch v Sturgis*, 2010 NY Slip Op 80669(U) (4th Dept 2010).

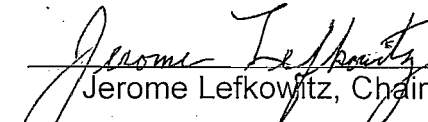
⁵⁰ Section 213.2(b)(4) of the Rules; *UFT (Hunt)*, 45 PERB ¶3038 (2012).

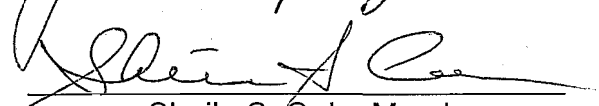
⁵¹ *CSEA (Paganini)*, *supra*, note 44.

⁵² *Board of Educ of the City Sch Dist of the City of New York (Greenberg)*, 16 PERB ¶3067 (1983); *Bd of Educ. of the City Sch of the City of New York (Behrens)*, 15 PERB ¶3042 (1982); *UFT (Goldstein)*, 42 PERB ¶3035 (2009).

Based upon the foregoing, Hirsch's exceptions are denied, and his charge is dismissed.

DATED: October 15, 2013
Albany, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO,**

Charging Party,

CASE NO. U-30650

- and -

**STATE OF NEW YORK (DEPARTMENT OF
TRANSPORTATION),**

Respondent.

**STEVEN A. CRAIN AND DAREN J. RYLEWICZ, GENERAL COUNSELS
(PAUL S. BAMBERGER of counsel), for Charging Party**

**MICHAEL N. VOLFORTE, ACTING GENERAL COUNSEL (CLAY J.
LODOVICE of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the State of New York (Department of Transportation) (State) to a decision by an Administrative Law Judge (ALJ) on an improper practice charge filed by the Civil Service Employees Association, Local 1000, AFSCME, AFL-CIO (CSEA) alleging that the State violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally terminated a past practice by imposing a rule prohibiting CSEA-represented unit employees from continuing to listen to music on personal electronic devices and radios at their respective work stations at the Hamburg facility of New York State Department of Transportation (DOT).¹ In reaching her decision, the ALJ concluded that the subject of CSEA's improper practice charge is a term and condition of employment and, therefore, a mandatory subject of negotiations under the Act because it relates to the comfort and convenience of the employees.

¹ 46 PERB ¶4518 (2013).

EXCEPTIONS

In its exceptions, the State asserts that the ALJ erred by concluding that the at-issue subject constitutes a term and condition of employment that is mandatorily negotiable under the Act. In addition, the State challenges the ALJ's conclusion that it unilaterally changed an enforceable past practice under the Act. Finally, it asserts that the ALJ's decision and remedial order conflicts with its legal obligations to reasonably accommodate an employee with a disability under the Americans with Disabilities Act (ADA).² CSEA supports the ALJ's decision.

Following our review of the record and the parties' respective arguments, we affirm the ALJ's decision.

FACTS

The record before us is limited to a stipulation of facts, along with a redacted copy of a settlement agreement reached between DOT and a DOT employee at the Hamburg facility resolving a charge of disability discrimination that had been filed with the United States Equal Employment Opportunity Commission (EEOC).³

For at least 10 years prior to December 2010, CSEA-represented unit employees working at the Hamburg facility, with the knowledge of DOT, have been permitted to play radios during the workday at their respective work stations. In or about 2006, the above-referenced employee at the DOT facility, who is a member of the CSEA-represented unit, requested that DOT prohibit the playing of radios in the workplace as a reasonable accommodation for his hearing impairment because the noise caused by the multiple radios interfered with his ability to perform his job duties.

² 42 USC §12101, *et seq.*

³ Stipulation of Facts, Exhibit A.

Based on the reasonable accommodation request, DOT implemented a rule in 2006 that permitted employees at the facility to continue playing radios at their respective work stations but mandated that the volume not exceed a specified decibel level.

In 2008, the employee who had requested the accommodation filed his charge of discrimination with EEOC alleging that DOT violated Title VII of the Civil Rights Act of 1964 (Title VII) and the ADA by failing to reasonably accommodate him because the decibel limitation imposed in 2006 had not been adhered to and enforced by DOT. The employee was represented before the EEOC by private counsel rather than CSEA, which was not a named respondent in the discrimination charge.

In November 2010, a settlement was reached between the employee and DOT concerning his EEOC charge and a related charge pending at the New York State Division of Human Rights. CSEA was not a party to the settlement agreement. DOT agreed in the settlement, *inter alia*, to do the following:

That, within thirty (30) calendar days of the effective date of this agreement:

- i) it will prohibit the playing of radios in the shop to which the Charging Party is assigned, including in state vehicles being worked on and including the area outside the shop but on state property;⁴

As part of the settlement, DOT did not admit to violating Title VII or the New York State Human Rights Law (NYSHRL),⁵ and the DOT employee agreed that he would not pursue a lawsuit under Title VII or NYSHRL. The settlement agreement was reviewed and approved by the EEOC Buffalo Office Director. As a result of the settlement, the EEOC's investigation was terminated without any determination

⁴Stipulation of Facts, Exhibit A. ¶8(b).

⁵ Exec Law §290, *et seq.*

concerning the merits of the discrimination charge.

Based on the terms of the settlement, DOT unilaterally imposed a rule on or about December 3, 2010, prohibiting all employees at its Hamburg facility, including CSEA-represented unit employees, from playing radios during the workday at their respective work stations. It is undisputed that CSEA did not agree to the new rule, and DOT did not seek to negotiate with CSEA regarding the rule.

Notably, the stipulated record lacks relevant probative evidence concerning the State's interests in imposing the ban, including a description of the at-issue workplace,⁶ the duties and responsibilities performed there, the number of unit employees, the number of unit employees participating in the practice, the number and nature of complaints received about the practice, the public's accessibility to the work location, the scope and nature of workplace sounds from other sources, the existence of conflicts in the workplace over musical preferences, and whether the State considered other ways to reasonably accommodate the employee with the hearing impairment without imposing a total ban on the playing of music.

DISCUSSION

We begin with the State's exceptions challenging the ALJ's conclusion that the subject of employees listening to personal electronic musical devices and radios during the workday is a term and condition of employment and mandatorily negotiable under the Act because it relates to employee comfort and convenience.

⁶ The State references the facility as a garage in its brief. Memorandum on Behalf of the State of New York, pp. 5-6. However, the record before us is silent concerning the nature of the DOT facility.

In *City of Albany*,⁷ we reiterated the applicable balancing test for determining whether a particular subject is mandatorily negotiable under the Act:

[We have] long applied a balancing test to determine whether a unilateral promulgation or alteration of a work rule violates the Act.⁸ In applying this balancing test, we examine the record to determine whether there is preponderance of credible evidence to demonstrate that the employer's need for a particular mission-related work rule outweighs the effect that the rule has on the employees' terms and conditions of employment. The mere fact that a work rule has a relationship to an employer's mission does not permit an employer to act unilaterally in any manner it deems appropriate.⁹ Rather, an employer can unilaterally impose a work rule only to the extent that the unilateral action does not significantly or unnecessarily intrude on the protected interests of bargaining unit employees under the Act. Therefore, under the balancing test the burden rests with the employer to demonstrate that the new work rule does not go beyond what is necessary to further its mission.¹⁰ (Footnotes in original).

As a result, our determination with respect to whether a particular employer workplace decision is mandatorily negotiable requires a fact-specific examination of employer and employee interests.¹¹

In the present case, the State contends that the ALJ failed to properly apply the balancing test by concluding that the comfort and convenience of employees in listening to music at work is a term and condition of employment that outweighs what

⁷ 42 PERB ¶3005 at 3007 (2009).

⁸ *County of Rensselaer*, 13 PERB ¶3080 (1980); *Steuben-Allegany BOCES*, 13 PERB ¶3096 (1980); *State of New York (Governor's Office of Employee Relations)*, 18 PERB ¶3064 (1985).

⁹ *County of Montgomery*, 18 PERB ¶3077 (1985).

¹⁰ *County of Niagara (Mount View Health Facility)*, 21 PERB ¶3014 (1988).

¹¹ *Nanuet Union Free Sch Dist*, 45 PERB ¶3007 (2012).

the State describes as its "managerial interest in providing all employees a work environment wherein each can effectively perform their job duties without undue interference from the personal noise and music preferences of other employees."¹²

We disagree.

First, we reject the State's argument that listening to music at work does not constitute a term and condition of employment under the Act. While the subject does not have the same objective level of importance as salaries, wages, hours and other terms and conditions, it is a workplace benefit that clearly affects the comfort of employees. As the National Labor Relations Board (NLRB) recognized in *White Pine, Inc.*,¹³ the threatened elimination of the privilege of listening to the radio in the workplace is a threat to impose more onerous working conditions on the employees. Furthermore, the subject is analogous to other working conditions that we have found to be a mandatory subject because they affect employees' comfort and convenience.¹⁴

Contrary to the State's argument, our precedent concerning employees' interest in comfort and convenience does not require that the benefit have an

¹² Memorandum on Behalf of the State of New York, p. 6.

¹³ 213 NLRB 566 (1974).

¹⁴ See *Scarsdale PBA*, 8 PERB ¶3075 (1975) and *Police Assn of New Rochelle, Inc.*, 10 PERB ¶3042 (1977)(air conditioning in police vehicles); *Local 294, IBT*, 10 PERB ¶3007 (1977) (air conditioning and split level seats in police vehicles); *County of Niagara (Mount View Health Facility)*, *supra*, note 10 (restrictions on employee smoking in workplace areas not customarily used by resident patients); *State of New York (Dept of Taxation and Finance)*, 30 PERB ¶3028 (1997)(restrictions on wearing jeans in the workplace); *County of Nassau*, 32 PERB ¶3034 (1999)(the provision of free bottled spring water); *State of New York (Department of Correctional Services)*, 38 PERB ¶3008 (2005)(limitations on containers used by employees to carry personal food).

economic component. The fact that we have found some subjects to be mandatory because they affect comfort and convenience and have an economic consequence,¹⁵ does not mean that the latter is a necessity for purposes of our negotiability analysis.

Based upon the record before us, we conclude that the State failed to meet its evidentiary burden of demonstrating that its interests outweigh the interests of the unit employees in continuing to listen to music at work. The State did not present any evidence concerning the physical layout and structure of the workplace, the public's accessibility, the work performed by unit employees, the amount and volume of sound created by other sources, the number of employees involved in the practice, the number of other employees who might have complained about the music or that there have been conflicts in the workplace over musical preferences. Furthermore, the State failed to demonstrate that the unilateral imposition of the ban on listening to music on personal electronic devices and radios at work stations does not go beyond what is necessary to meet its managerial interests. For example, there is no evidence to suggest that the State considered less intrusive alternatives including more aggressively enforcing the 2006 decibel limitation or requiring employees to utilize employer-supplied headphones.

Next, we turn to the State's contention that CSEA failed to prove the existence of an enforceable past practice. Under the applicable test for determining the presence of a binding past practice, the charging party must demonstrate that the practice was unequivocal and continued uninterrupted for a period of time sufficient

¹⁵ See *County of Nassau, supra*, note 14; *Saratoga County Deputy Sheriffs Benevolent Assn*, 37 PERB ¶3024 (2004), *revd on other grounds*, *County of Saratoga v New York State Pub Empl Rel Bd*, 21 AD3d 1160, 38 PERB ¶7013 (3d Dept 2005).

under the facts and circumstances to create a reasonable expectation among the affected unit employees that the practice would continue.¹⁶ That *prima facie* showing is subject to an employer's affirmative defense that it lacked actual or constructive knowledge of the practice. In the present case, the evidence reveals that the at-issue practice at the Hamburg facility existed for at least 10 years with DOT's knowledge, which we find created a reasonable expectation that the practice would continue. The fact that the practice was modified in 2006 by imposing a maximum decibel level does not undermine the unequivocal and continued nature of the practice of permitting employees to listen to music on their own devices or radios during the workday.

In addition, we reject the State's reliance on its statutory obligation under the ADA to provide a reasonable accommodation to the unit employee with the hearing impairment and the settlement reached with that employee.

Legally and historically, collective bargaining and civil rights are intertwined branches of the same tree. Both employers and labor organizations are covered entities under the ADA¹⁷ and the provisions of Title I of the ADA do not constitute a license for unilateral actions by employers in contravention of the duty to negotiate

¹⁶ *Chenango Forks Cent Sch Dist*, 40 PERB ¶¶3012 (2007), *remanded*, 42 PERB ¶¶4527 (2009), *affd*, 43 PERB ¶¶3017 (2010), *confd sub nom*, *Chenango Forks Cent Sch Dist v New York State Pub Emp Rel Bd*, 95 AD3d 1479, 45 PERB ¶¶7006 (3d Dept 2012) *affd*, 21NY3d 255, 46 PERB ¶¶7008 (2013).

¹⁷ 42 USC §12111(2).

under the Act or in violation of an established seniority system.¹⁸ The obligation of a covered entity to accommodate an individual's disability under the ADA is subject to the undue hardship limitation set forth in 42 USC §12112(b)(5)(A).¹⁹ Based upon that limitation, the EEOC expressly encourages employers to engage the labor organization representing the employees at the workplace for purposes of developing an acceptable accommodation.²⁰

Representation by an employee organization of a unit member seeking a reasonable accommodation for a physical or mental impairment is well within the representational rights guaranteed by §§202 and 203 of the Act. The fact that the unit employee in the present case was not represented by CSEA in seeking an

¹⁸ See *Industria Lechera De Puerto Rico, Inc.*, 344 NLRB 1075 (2005); *US Airways, Inc v Barnett*, 535 US 391 (2002). The duty to negotiate under §209-a.1(d) of the Act is not suspended or nullified because the subject matter relates in some manner to laws prohibiting workplace discrimination. See *Patchogue-Medford Union Free Sch Dist*, 30 PERB ¶¶3041 (1997)(employer violated its duty to negotiate in good faith by unilaterally imposing certain internal investigatory procedures concerning complaints of sexual harassment made against unit employees); *County of Erie and Erie County Sheriff*, 36 PERB ¶¶3021 (2003), *confirmed sub nom. County of Erie and Erie County Sheriff v State of New York*, 14 AD3d 14, 37 PERB ¶¶7008 (3d Dept 2004) (employer violated its duty to negotiate in good faith when it refused an employee organization's request for relevant materials from the employer's EEO and internal affairs files to enable the employee organization to determine the merits of a disciplinary grievance by a unit member challenging his discharge for sexual harassment). In addition, legal protections under the Act can overlap with similar protections provided by employment discrimination laws. See *Long Beach City Sch Dist and Long Beach Administrators' Union (Fail-Maynard)*, 43 PERB ¶¶3024 (2010)(the duty of fair representation doctrine codified in §§209-a.2(a) and (c) of the Act originated in case law involving claims of racially motivated unequal treatment by private sector unions).

¹⁹ The NYSHRL also includes an undue hardship limitation to the obligation to provide a reasonable accommodation to a disabled employee. See Exec Law §§292.21-e and 296.3(b). See also *Romanello v Intesa Sanpaolo*, __NY3d__, 2013 NY Slip Op 06600 (Oct 10, 2013).

²⁰ EEOC Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act, §3.9.

accommodation did not give the State the right to unilaterally change the terms and conditions of employment for all unit employees at the facility. There is no evidence demonstrating that DOT sought CSEA's participation in the interactive process concerning the requested accommodation or even communicated with CSEA prior to imposing the at-issue ban on listening to music at the facility.

It is incumbent upon us to emphasize the narrowness of our decision requiring the State in this case to engage in the statutorily mandated process of collective negotiations with respect to eliminating the past practice of employees listening to music during the workday at the Hamburg facility. This case involves the unilateral imposition of a total ban on such activities in that facility in contravention of a binding past practice; where the State failed to meet its evidentiary burden of demonstrating that its interests in imposing the ban outweighed the interests of the employees.

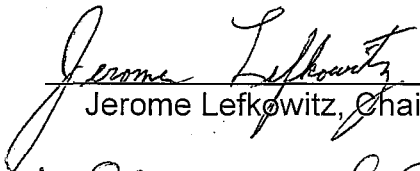
Finally, in response to concerns expressed by the State in its exceptions, we underscore that our decision should not be interpreted as holding that the subject is mandatorily negotiable in every workplace regardless of demonstrable employer interests or that employees have a right under the Act to listen to music in the workplace. Under different facts and circumstances stemming from a more complete record, we might very well have found that the State met its burden under the balancing test. Furthermore, our decision should not be construed as indicating any obligation under the Act to negotiate over employee musical preferences whether they are Chopin or Schoenberg, Monk or Mingus, Ella or Hendrix.


Based upon the foregoing, we find that the State violated the Act by unilaterally terminating the past practice of allowing unit employees to listen to personal electronic musical devices and radios at their respective work stations at the

Hamburg facility. Therefore, the State is hereby ordered to:

1. Cease and desist from prohibiting unit employees from listening to personal electronic musical devices and radios at their respective work stations at the Fleet Administration Building in Hamburg, New York, without prior negotiations with CSEA;
2. Sign and post the attached notice at all physical and electronic locations customarily used to post notices to unit employees.

DATED: October 15, 2013
Brooklyn, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Board Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the State of New York (Department of Transportation) in the unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) that the State of New York will:

Not prohibit unit employees from listening to personal electronic musical devices and radios at their respective work stations at the Fleet Administration Building in Hamburg, New York, without prior negotiations with CSEA.

Dated

By
on behalf of **STATE OF NEW YORK**
(DEPARTMENT OF TRANSPORTATION)

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**UNITED FEDERATION OF TEACHERS, LOCAL 2,
AFT, AFL-CIO,**

CASE NO. U-29549

Charging Party,

- and -

**BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK,**

Respondent.

**RICHARD E. CASAGRANDE, ESQ. (ORIANA VIGLIOTTI of counsel) for
Charging Party**

**DAVID BRODSKY, DIRECTOR OF LABOR RELATIONS (KELLIE TERESE
WALKER of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the United Federation of Teachers, Local 2, AFT, AFL-CIO (UFT) to a decision of an Administrative Law Judge (ALJ) dismissing an improper practice charge alleging that the Board of Education of the City School District of the City of New York (District) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally implemented new Speech and Language Standards of Practice (standards of practice) upon UFT-represented speech teachers, which significantly increased their workload and extended their

extended their workday, and when the District refused to negotiate the impact of the new standards with UFT.¹

Following a hearing, the ALJ issued a decision concluding that UFT failed to demonstrate that the District's unilateral imposition of the new standards of practice substantially increased the teachers' workload and workday thereby violating §209-a.1(d) of Act. In addition, the ALJ dismissed UFT's claim that the District violated its duty to negotiate the impact of its decision in violation of §209-a.1(d) of Act on the basis that the charge fails to allege sufficient facts to set forth that claim under the Act.

EXCEPTIONS

In its exceptions, UFT asserts that the ALJ's decision should be reversed because it failed to examine the facts under our precedent holding that the assignment of additional duties extending the workday of unit employee constitutes a mandatory subject of negotiations under the Act. UFT also excepts to the ALJ's finding that there is insufficient evidence in the record to demonstrate that the District's unilateral action sufficiently increased the teachers' workload to constitute a violation of §209-a.1(d) of Act. In the alternative, UFT requests that the case be remanded for further evidentiary findings with respect to whether the workload was increased on a day-to-day basis. In addition, it requests that the Board adopt a new standard for determining when a workload increase constitutes a violation of §209-a.1(d) of Act. Finally, UFT contends that the ALJ erred in concluding that the charge did not allege that it demanded to negotiate the impact of the District's decision, and that the District refused. The District

¹ 45 PERB ¶4574 (2012).

supports the ALJ's decision.

Based upon our review of UFT's exceptions, and the District's response, we reverse the ALJ's decision and remand the case for further processing consistent with our decision.

DISCUSSION

We begin with UFT's exception challenging the ALJ's dismissal of UFT's claim that the District violated §209-a.1(d) of Act by refusing to negotiate the impact of its decision to impose the new standards of procedure on UFT-represented teachers. In her decision, the ALJ concluded the charge failed to allege that UFT demanded impact negotiations, and that the District rejected the demand.

In its charge, UFT alleges that it sent a letter dated May 18, 2009 to the District's Director of Labor Relations concerning the new standards, which stated, in part:

There is a need for bargaining between the UFT and the [District] with respect to these Standards since, among other things, they affect the workload of UFT-represented speech improvement teachers. Indeed, the new standards create a substantial amount of new work which must be completed in specified amount of time and which is in addition to all of the other work previously required of speech teachers.²

In addition, the charge alleges that on June 19, 2009, UFT representatives met with District representatives to discuss the new standards of procedure.³ It also alleges that the District refused to negotiate both the decision to implement and the impact of those

² ALJ Exhibit 1, ¶6. The full body of the letter is attached to the charge as Exhibit A.

³ ALJ Exhibit 1, ¶7.

standards.⁴ In its answer, the District admits receiving UFT's May 18, 2009 letter but denies that it refused to negotiate the implementation or the impact of the new standards with UFT.⁵

Based upon our review of UFT's May 18, 2009 letter and the allegations of the charge, we reverse the ALJ's dismissal of UFT's claim that the District violated §209-a.1(d) of Act by refusing to negotiate the impact of the standards on UFT-represented teachers. The May 18, 2009 letter demanded that the District commence decisional and impact negotiations concerning the standards. Furthermore, the charge expressly alleges that the District refused to engage in impact negotiations. Therefore, we conclude that the charge's allegations were sufficient to state a claim that the District violated its duty to engage in impact negotiations, and remand the case to the ALJ to determine whether the District violated its duty under the Act. Nothing in our decision precludes the ALJ, at her discretion, from reopening the record for purposes of receiving offers of proof and/or additional evidence from the parties with respect to the allegation that the District violated its duty to negotiate over the impact of the implementation of the standards.⁶

We next turn to UFT's assertion that the ALJ erred in failing to examine the facts based upon our case law holding that an employer's unilateral assignment of additional

⁴ ALJ Exhibit 1, ¶10.

⁵ ALJ Exhibit 2.

⁶ The District's sole witness, Director of the Center for Assistance Technology Judy Manning, testified that she was not aware of UFT's May 18, 2009 letter and did not know whether the District responded. Transcript, p. 993.

duties can violate §209-a.1(d) of Act by extending the workday of the at-issue unit employees. It is well-settled that an employer is obligated to negotiate a decision to assign new duties to unit employees that results in the lengthening of the employees' workday, even though those duties are inherently a part of the employees' occupation.⁷ The ALJ's decision in the present case, however, is silent with respect to the precedent establishing that principle. Instead, it appears that the ALJ's analysis concerning the alleged lengthening of the workday was premised upon the standard that we utilize for determining whether the imposition of an increased workload is mandatorily negotiable.⁸

In light of the ambiguity in the ALJ's decision concerning the standard applied in finding that the workday of the unit employees was not lengthened, it is necessary for us to reverse and remand the decision for a clarification before reviewing the ALJ's conclusion that UFT failed to prove that the District's unilateral action significantly increased the workload of unit employers or extended their workday in violation of the §209-a.1(d) of Act.

Upon remand, the ALJ may, at her discretion, reopen the record for the parties to present offers of proof and/or additional evidence with respect to the claim that the District's decision to unilaterally impose the standards of practice violated §209-a.1(d)


⁷ See *Sackets Harbor Cent Sch Dist*, 13 PERB ¶3058 (1980); *South Jefferson Cent Sch Dist*, 13 PERB ¶3066 (1980).


⁸ *New Rochelle Housing Auth*, 21 PERB ¶3054 (1988); *Edgemont Union Free Sch Dist at Greenburgh*, 21 PERB ¶3067 (1988).

of Act. In addition, the ALJ may request that the parties submit supplemental legal arguments regarding the applicable benchmark in the present case for determining whether the UFT-represented employees' workload has been significantly increased by the District's unilateral action.

Based upon the foregoing, the ALJ's decision is reversed and the case remanded for further processing consistent with this decision.

DATED: October 15, 2013
Brooklyn, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

CITY OF YONKERS,

Petitioner,

-and-

CASE NO. IA2013-017

**YONKERS FIRE FIGHTERS, LOCAL 628,
IAFF, AFL-CIO**

Respondent.

**PUTNEY, TWOMBLY, HALL & HIRSON, LLP (DANIEL F. MURPHY, JR. and
JOSEPH B. CARTAFALSA, of counsel) for Petitioner**

**MEYER, SUOZZI, ENGLISH & KLEIN, P.C. (RICHARD S. CORENTHAL, of
counsel) for Respondent**

BOARD DECISION AND ORDER

This matter comes to the Board on exceptions filed by the City of Yonkers (City) seeking to overturn a decision of the Director of Conciliation (Director) dated June 21, 2013, declining to process the City's petition for interest arbitration concerning an impasse for the period July 1, 2009-June 30, 2011, and the Director's decision dated August 6, 2013, declining to process another City petition for interest arbitration concerning a purported impasse for the period July 1, 2011-June 30, 2013.

The Director's initial decision was based upon our holding in *City of Kingston*¹ and the response by the Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO (Local 628) objecting to the processing of the petition and consenting to have the terms of the

¹ 18 PERB ¶3036 (1985).

expired collectively negotiated agreement (agreement) continue pursuant to §209-a.1(e) of the Public Employees' Fair Employment Act (Act). In *City of Kingston* we concluded that, under the Act, an employer does not have the right to proceed to interest arbitration without the employee organization's consent.

In his subsequent decision, the Director declined to process the City's second petition on the grounds that its exceptions were pending concerning his prior decision and, therefore, proceeding with the impasse procedure would be premature and speculative. In addition, the Director found that the City's petition failed to demonstrate that negotiations regarding the at-issue period had taken place, that there had been a determination that an impasse exists, and that mediation had taken place.

EXCEPTIONS

In its exceptions, the City contends that our holding in the *City of Kingston* should be reversed because it is inconsistent with §209.4(c)(i) of the Act and §205.4 of our Rules of Procedure (Rules). In the alternative, the City seeks a determination that Local 628 has waived its right to negotiate over, or to subsequently seek to arbitrate, the terms and conditions of employment for the periods 2009-2011 and 2011-2013 following the expiration of the agreement. Local 628 supports the Director's decision based upon *City of Kingston* and asserts that the City's alternative waiver argument is meritless.

DISCUSSION

Our holding in *City of Kingston* was premised upon the wording of §209-a.1(e) of Act, its legislative history and the decision in *Niagara County Legislature and County of*

Niagara (County of Niagara).² Following a review of the City's exceptions, we find no basis for reversing *City of Kingston*.

In *County of Niagara*, the Appellate Division, Fourth Department affirmed our determination that the mandate of §209-a.1(e) of Act requiring an employer "to continue all the terms of an expired agreement until a new agreement is negotiated," along with the legislative history of that provision demonstrate that, without an employee organization's consent, a legislative body under §209.3(e) of the Act is prohibited from ending an impasse by altering the terms and conditions of employment of an expired agreement.

In reaching our decision in *City of Kingston* we relied upon the same statutory language and legislative history. That history includes Governor Carey's July 29, 1982 memorandum approving the enactment of the bill to add §209-a.1(e) to the Act in which he stated an intent to seek an amendment to provide that an employer's duty to continue all the terms of an expired agreement would extend only until either a new agreement was negotiated or the negotiating impasse was finally resolved through the procedures set forth in §209 of the Act.³ Later that year, however, the Legislature rejected the bill introduced at Governor Carey's request that would have terminated an

² See *Niagara County Legislature and County of Niagara*, 16 PERB ¶¶3071 (1983) vacated sub nom, *County of Niagara, New York v Newman*, 122 Misc2d 749, 17 PERB ¶¶7003 (S Ct Niagara County 1984), reversed 104 AD2d 1, 17 PERB ¶¶7021 (4th Dept 1984).

³ L 1982, c 868, Memorandum of Governor Hugh L. Carey, July 29, 1982. McKinney's 1982 Session Laws of New York at pp. 2631-2632.

employer's obligation to continue the terms of an expired agreement upon a final resolution of a negotiating impasse through legislative imposition under §209.3(e) of the Act or interest arbitration under §209.4 of the Act. Instead, §209-a.1(e) of the Act was amended to terminate the employer's statutory obligation only after we find that an the "employee organization which is a party to such agreement has, during such negotiations or prior to such negotiations," engaged in conduct violative of §210 of the Act.⁴

The Court of Appeals in *Town of Southampton v New York State Pub Empl Rel Bd*,⁵ cited *City of Kingston* with favor in describing the scope of an employer's obligation to maintain the *status quo* under §209-a.1(e) to the Act. Finally, we note that the Legislature, when enacting the substantial 2013 amendments to the interest arbitration procedures set forth in §209 of the Act, did not amend the Act to overturn our decision in *City of Kingston*. Instead, it mirrored our decades-old holding by conditioning the use of the newly enacted alternative arbitration procedure with respect to a fiscally eligible municipality upon the consent of the employee organization through a joint request made with the employer.⁶

⁴ L 1982, c 921.

⁵ 2 NY3d 513, 37 PERB ¶7001(2004).

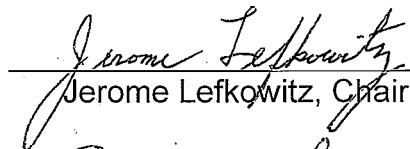
⁶ L 2013, c 67, §3; §4-a(a) of the Act.

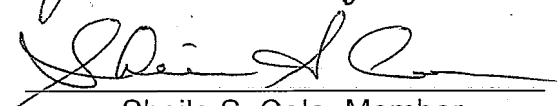
We also deny the City's request that we make a determination that Local 628 has waived its right to negotiate over, or to subsequently seek to arbitrate, the terms and conditions of employment for the at-issue two year periods following the expiration of the parties' agreement. The appropriate procedure for seeking a determination as to whether a party has violated its duty to negotiate in good faith is through the filing of an improper practice charge pursuant to §209-a of the Act.

Finally, we affirm the Director's conclusion that the City's second petition should not be processed because it is premature and speculative.

Based upon the foregoing, the City's exceptions are denied and we affirm the Director's two decisions.

DATED: October 15, 2013
Brooklyn, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

JOSE RODRIGUEZ,

Charging Party,

CASE NOS.

U-30747 & U-31421

- and -

**BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK,**

Respondent.

DAVID BROPHY, for Charging Party

**DAVID BRODSKY, ESQ., DIRECTOR OF LABOR RELATIONS (KERRI A.
CROSSAN, of counsel), for Respondent**

BOARD DECISION AND ORDER

These cases come to the Board on exceptions filed by the Board of Education of the City School District of the City of New York (District) to a decision of an Administrative Law Judge (ALJ), on improper practice charges filed by Jose Rodriguez (Rodriguez). In her decision, the ALJ found that the District violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it subjected Rodriguez to excessive classroom visits, issued a disciplinary letter against him, and rated his job performance as unsatisfactory in his mid-year and year-end evaluations, in retaliation for his protected activity under the Act.¹

¹ 46 PERB ¶14509 (2013).

EXCEPTIONS

Among its exceptions, the District asserts that the ALJ erred by denying its requests for an opportunity to review documents utilized by Rodriguez to refresh his recollection during his testimony concerning the frequency of classroom visits by school administrators after he had filed grievances. Rodriguez supports the ALJ's evidentiary ruling and decision.

Following our review of the exceptions and response, we conclude that the ALJ erred by depriving the District of an opportunity to review the documents utilized by Rodriguez to refresh his recollection for use during cross-examination. As a result, we remand the case to the ALJ with the direction to reopen the record consistent with our decision.

DISCUSSION

During the hearing, Rodriguez testified that after he filed grievances, he was subjected to increased classroom visits by school administrators in September and October, 2010. The record reveals that Rodriguez repeatedly reviewed documents in his possession during his testimony to refresh his recollection.² The documents were not introduced into evidence and their specific nature is not clear from the record. They are referenced as logs, personal notes, a calendar and a notebook.³

It is well-settled that an adversary has a general right to examine any writing used by a witness to refresh his or her recollection during a trial or hearing, and to utilize

² Transcript, pp. 24-25, 27-28, 31, 65-69, 72.

³ Transcript, pp. 24-25, 27, 31, 65, 68, 70, 72, 80, 85-86.

it during cross-examination of that witness.⁴ While the technical rules of evidence are not applicable during our hearings, they are instructive.⁵

In the present case, the ALJ denied requests by the District for access to the documents utilized by Rodriguez to refresh his recollection in order to prepare and to use the documents during cross-examination.⁶ The record reveals that the ALJ's rulings were aimed at maintaining decorum and order during the hearing, which involved a *pro se* party testifying in narrative form. Nevertheless, we find that the ALJ erred in denying the District the opportunity to review and use the documents during cross-examination. In fact, the ALJ specifically referenced Rodriguez's documents in crediting his testimony.⁷

Based upon the foregoing, we remand the charges to the ALJ with the direction to reopen the record to permit the District to review the documents Rodriguez used to refresh his recollection during his testimony, and provide the District with an opportunity to conduct additional cross-examination of Rodriguez limited to issues stemming from the content of those documents. Following the reopening of the record and the taking of further evidence, the ALJ shall issue a revised decision, which will be subject to new exceptions under §213 of our Rules of Procedure. In light of our remand and the

⁴ *People v Gezzo*, 307 NY 385 (1954). *Doxtator v Swarthout*, 38 AD2d 782 (4th Dept 1972); *Greico v Cunningham*, 128 AD2d 502 (2d Dept 1987).

⁵ *Council 82, AFSCME (Bruns)*, 35 PERB ¶13023 (2002).

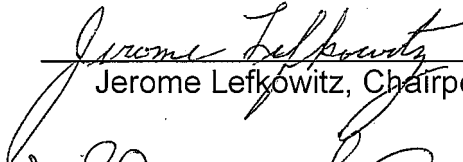
⁶ Transcript, pp. 61, 65-6.


⁷ *Supra*, note 1, 46 PERB ¶4509 at 4516.

direction for a partial reopening of the record, we have not addressed the District's other exceptions. Those other exceptions can be renewed by the District, if necessary, following the ALJ's revised decision.

IT IS ORDERED that the charges are remanded to the ALJ with a direction to reopen the record to permit the District to review the documents relied upon by Rodriguez to refresh his recollection during his testimony, and to conduct additional cross-examination of Rodriguez limited to the content of those documents.

DATED: October 15, 2013
Brooklyn, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO,**

Petitioner,

CASE NO. CP-1342

- and -

WEEDSPORT CENTRAL SCHOOL DISTRICT,

Employer.

**STEVEN A. CRAIN AND DAREN J. RYLEWICZ, GENERAL COUNSELS
(BRIAN B. SELCHICK of counsel), for Petitioner**

QUINN MARIE MORRIS, for Employer

BOARD DECISION AND ORDER

This case comes to the Board on exceptions by the Weedsport Central School District (District) to a decision of an Administrative Law Judge (ALJ) granting a unit placement petition filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) to place the position of Head Building Maintenance Person into the CSEA-represented unit.¹

In its exceptions, the District contends the ALJ's decision should be reversed based upon a provision of the parties' expired collectively negotiated agreement (agreement); which excludes the position from the unit. According to the District, the unit composition provision of the agreement constitutes a mandatory subject of negotiations under the conversion theory of negotiability, which estops CSEA from filing

¹ 46 PERB ¶4007 (2013). The Board acknowledges the assistance of law student intern Samantha Delia in the preparation of its decision.

a unit placement petition. The District also contends that the filing of the petition constitutes a repudiation of the agreement by CSEA. Finally, the District asserts that a community of interest does not exist because of the potential for conflict inherent in the District's ability to assign supervisory duties to employees holding the title of the Head Building Maintenance Person.

Following our review of the arguments by the parties, and the evidence in the record, we affirm the ALJ's decision.

FACTS

The relevant facts are set forth in the ALJ's decision, which were based upon a stipulation of facts between the parties.

CSEA represents a unit of District employees comprised of approximately 44 non-instructional titles, including Auto Mechanic, Custodial Worker, Senior Custodial Worker and Groundskeeper/Building Maintenance Person. The parties' expired agreement explicitly excludes a number of titles from the bargaining unit, including Head Building Maintenance Person.

There are currently two employees in the title of Head Building Maintenance Person. Neither sought to be accreted to the CSEA-represented unit and one opposes such placement. Both perform duties related to the repair and maintenance of District equipment and buildings, and they do not perform any managerial or confidential duties as defined by the Act. Neither hires, fires, or disciplines other District employees. Their wages and benefits are similar to those negotiated by CSEA on behalf of unit members.

DISCUSSION

A unit placement petition commences a representation proceeding limited to determining whether an unrepresented position should be accreted to a pre-existing unit based upon the statutory criteria in §207.1 of the Public Employees' Fair Employment Act (Act). We conduct a nonadversarial investigation and apply the statutory uniting criteria in determining a unit placement petition.² The most important criterion under §207.1 of the Act for determining a unit placement petition is the community of interest standard. Among the factors we consider in determining whether a community of interest exists are similarities in terms and conditions of employment, shared duties and responsibilities, qualifications, common work location, common supervision, and an actual or potential conflict of interests between the members of the proposed unit.³

We reject the District's arguments premised upon the unit composition provision of the parties' expired agreement. It is common for agreements to identify the titles included and excluded from the unit that is subject to the negotiated terms and conditions of employment. The content of a provision concerning unit composition is not controlling upon us in applying our statutory duties pursuant §207 of the Act.⁴ Furthermore, under §201.2(b) of our Rules of Procedure (Rules), the existence of such a provision does not estop an employee organization from filing a unit placement

² See *General Brown Cent Sch Dist*, 28 PERB ¶3065 (1995).

³ See *Sachem Cent Sch Dist*, 42 PERB ¶3030 (2009).

⁴ *County of Rockland*, 28 PERB ¶3063 (1995); *Regional Transit Serv, Inc.*, 35 PERB ¶3022 (2002).

petition, nor does it constitute a repudiation of the agreement.⁵ Finally, whether a change to the composition of the CSEA-unit is a mandatory subject of negotiations under the conversion theory of negotiability⁶ is not relevant to our determination concerning the question of representation presented by the unit placement petition.

We also reject the District's argument that the unit placement petition should be denied because the position of Head Building Maintenance Person has supervisory duties. As we stated in *New York State Division of State Police*⁷:

The mere existence of supervisory responsibilities does not require a conclusion that there is present such a conflict of interest as to overcome or outweigh other facts or circumstances giving rise to a community of interest. Rather, it is the degree and the nature of the supervision. Supervisory functions such as the imposition of discipline, effective initiation of disciplinary procedures or the evaluation of a subordinate's performance may indicate a conflict of interest.

The mere fact that a position has supervisory functions is not a *per se* basis for exclusion from a unit composed of a rank-and-file employees.⁸ There is nothing in the record demonstrating that the position Head Building Maintenance Person requires significant supervisory responsibilities, which would cause an actual or potential conflict

⁵ We would have reached the same conclusion if the District had filed an improper practice charge alleging that CSEA violated §209-a.2(b) of the Act by filing the representation petition.

⁶ *City of Cohoes*, 31 PERB ¶13020 (1998), *confd sub nom*, *Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v Cuevas*, 32 PERB ¶17026 (Sup Ct, Albany Co 1999), *aff'd*, 276 AD2d 184, 33 PERB ¶17019 (3d Dep't 2000), *lv denied*, 96 NY2d 711, 34 PERB ¶17018 (2001).

⁷ 1 PERB ¶1399.32 at 3156 (1968).

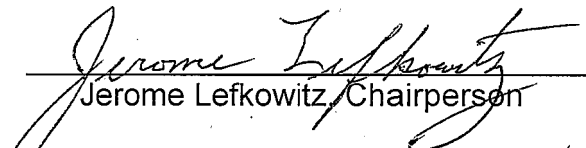
⁸ *New York Power Auth*, 38 PERB ¶13003 (2005); *Marcus Whitman Cent Sch Dist*, 33 PERB ¶13016 (1999).

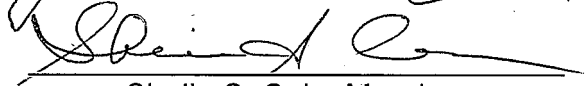
of interest.⁹

Finally, the District does not dispute that the Head Building Maintenance Person and titles in the CSEA bargaining unit share common terms and conditions of employment, work location and work responsibilities.

Based upon the foregoing, the District's exceptions are denied, CSEA's petition for unit placement is granted and the title of Head Building Maintenance Person is hereby accreted to the CSEA-represented unit.

DATED: October 15, 2013
Brooklyn, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member

⁹ *Clinton Cmty Coll*, 31 PERB ¶3070 (1997); *East Ramapo Cent Sch Dist*, 11 PERB ¶3075 (1978).

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**CIVIL SERVICE EMPLOYEES ASSOCIATION,
INC., LOCAL 1000, AFSCME, AFL-CIO,**

Charging Party,

- and -

CASE NO. U-29047

**STATE OF NEW YORK (DEPARTMENT OF CIVIL
SERVICE),**

Respondent.

In the Matter of

**DISTRICT COUNCIL 37, AFSCME, AFL-CIO,
LOCAL 1359,**

Charging Party,

- and -

CASE NO. U-29137

**STATE OF NEW YORK (DEPARTMENT OF CIVIL
SERVICE),**

Respondent.

In the Matter of

**NEW YORK STATE CORRECTIONAL OFFICERS
AND POLICE BENEVOLENT ASSOCIATION, INC.,**

Charging Party,

- and -

CASE NO. U-29179

**STATE OF NEW YORK (DEPARTMENT OF CIVIL
SERVICE),**

Respondent.

In the Matter of

**NEW YORK STATE PUBLIC EMPLOYEES
FEDERATION, AFL-CIO,**

Charging Party,

CASE NO. U-29409

- and -

**STATE OF NEW YORK (DEPARTMENT OF CIVIL
SERVICE),**

Respondent.

**STEVEN A. CRAIN and DAREN J. RYLEWICZ, GENERAL COUNSELS
(ELLEN M. MITCHELL of counsel), for CIVIL SERVICE EMPLOYEES
ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO**

**ROBIN ROACH, GENERAL COUNSEL (ERICA GRAY-NELSON
of counsel), for DISTRICT COUNCIL 37, AFSCME, AFL-CIO, LOCAL 1359**

**SHEEHAN, GREENE, GOLDBERMAN & JACQUES, LLP (EDWARD J.
GREENE, JR. of counsel), for NEW YORK STATE CORRECTIONAL
OFFICERS AND POLICE BENEVOLENT ASSOCIATION, INC.**

**LISA M. KING, GENERAL COUNSEL (STEVEN M. KLEIN of
counsel), for NEW YORK STATE PUBLIC EMPLOYEES FEDERATION,
AFL-CIO**

**MICHAEL N. VOLFORTE, ACTING GENERAL COUNSEL (CLAY J.
LODOVICE of counsel), for Respondent**

BOARD DECISION AND ORDER

These consolidated cases come to the Board on separate exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA), District Council 37, AFSCME, AFL-CIO, Local 1359 (DC 37), the New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA) and the New York State Public Employees Federation, AFL-CIO (PEF), and cross-exceptions by the State of New York (Department of Civil Service) (State), to a decision of an

Administrative Law Judge (ALJ) dismissing the respective charges of the employee organizations alleging that the State violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally imposed a fee schedule for civil service promotion/transition examinations. Without reaching the issue of whether the subject of the charges is a mandatory subject of negotiations, the ALJ dismissed the charges on the ground that the charging parties had failed to demonstrate a unilateral change in a past practice.¹

EXCEPTIONS

CSEA excepts to the ALJ's failure to determine that the subject of application fees for promotion/transition examinations is a mandatory subject under the Act and her finding that CSEA failed to prove that the State had unilaterally changed a past practice. For its exceptions, DC 37 contends that the ALJ misapplied the applicable standard for determining whether a binding past practice exists under the Act, and that the ALJ erred in concluding that the State's prior internal deliberations with respect to imposing application fees for the at-issue examinations constituted a binding past practice. Similarly, PEF asserts in its exceptions that the ALJ misapplied our precedent and erred in concluding that the State's unilateral action was consistent with a past practice of the State making periodic internal determinations as to whether to charge for the examinations. Finally, NYSCOPBA's exceptions challenge the ALJ's past practice analysis and determination, the ALJ's finding that the State did not need to negotiate the unilateral change because it was exercising its discretion under Civ Serv Law §50, and

¹ 45 PERB ¶4620 (2012). On the mutual consent of the parties, multiple extensions were granted to the parties for the filing of exceptions by CSEA, DC 37, NYSCOPBA and PEF and the response and cross-exceptions by the State.

her failure to determine whether the subject of the charges is a mandatory subject under the Act.

The State, in its response and cross-exceptions, supports the ALJ's decision but asserts she erred in failing to reach the issue of whether the subject of the charges is mandatory and whether PEF's charge is untimely.

Based upon our review of respective arguments of the parties, we reverse the decision of the ALJ to dismiss all four charges, and remand the case for further proceedings consistent with our decision.

FACTS

The applicable facts are fully set forth in the ALJ's decision, which are based upon the parties' stipulation and the testimony of two State witnesses. They are repeated here only as necessary to address the exceptions and cross-exceptions.

The State Department of Civil Service (DCS) notified PEF in a letter dated January 30, 2009, that it would be establishing a fee structure for applications for promotion/transition examinations as part of its 2008-2009 Spending Plan and that the collection of the application fees would commence for examinations to be announced on March 13, 2009 and administered on May 30, 2009.

In General Information Bulletin Number 09-01 (Bulletin 09-01) dated March 16, 2009, the DCS Director of Staffing Services announced to State department and agency personnel, human resources, and affirmative action offices that DCS would begin assessing fees for the processing of applications for promotion/transition examinations announced on or after March 13, 2009 and administered on or after May 30, 2009.

Bulletin 09-01 also announced increases in the application fees already paid for open

competitive examinations.

Following issuance of Bulletin 09-01, the State began assessing application fees for the promotion/transition examinations, and all employees in the collective negotiating units represented by the charging parties who applied for such examinations have paid the fees. It is not disputed that the fees were implemented without collective negotiations with the charging parties.

For at least ten years prior to issuance of Bulletin 09-01, the State did not require employees in the collective negotiating units represented by the charging parties to pay application fees for promotion/transition examinations and such fees were not paid by employees in those units.

DCS implemented the application fees in 2009 for fiscal reasons after its plan, which included other proposed DCS budgetary options, was reviewed and approved by the State Division of Budget (DOB). DOB approved the implementation of the fee schedule due to the State's economic condition at the time. When evaluating a proposal regarding application fees for civil service examinations, DOB considers a number of factors, including whether the proposal involves an existing or a new fee, the costs associated with implementation, the impact it will have and the likelihood that it will increase revenue within a specific time period.

In 2003, DCS had proposed to DOB that application fees for promotion/transition examinations for State employees be imposed and that fees for open competitive examinations be increased. At that time, DOB approved increasing the fees for open competitive examinations, but rejected the imposition of a fee for promotion/transition examinations. In 2004 and 2005, DOB again disapproved DCS proposals to establish

promotion/transition examination fees for State employees to achieve necessary budgetary cuts.

DISCUSSION

In *Chenango Forks Central School District (Chenango Forks)*,² we restated the applicable test for determining whether there is an enforceable past practice concerning a mandatory subject under the Act. Under that test, there must be a *prima facie* showing of a practice that was unequivocal and continued uninterrupted for a period of time sufficient under the facts and circumstances to create a reasonable expectation among the affected unit employees that the practice would continue. Our past practice analysis is fact-specific and, in general, a long term practice alone will constitute sufficient evidence to establish a *prima facie* case.³ The *prima facie* showing by a charging party, however, is subject to an employer's affirmative defense that it lacked actual or constructive knowledge of the practice.

In the present case, the record firmly demonstrates the State's actual knowledge of the practice. Therefore, the application of our past practice analysis under *Chenango Forks* centers on whether the facts and circumstances demonstrate that the State's ten year practice of not charging fees to take the promotion/transition examinations created

² 40 PERB ¶3012 (2007), *remanded*, 42 PERB ¶4527 (2009), *affd*, 43 PERB ¶3017 (2010), *confd sub nom*, *Chenango Forks Cent Sch Dist v New York State Pub Empl Rel Bd*, 95 AD3d 1479, 45 PERB ¶7006 (3d Dept 2012) *affd* 21 NY3d 255, 46 PERB ¶7008 (2013).

³ *Manhasset Union Free Sch Dist*, 41 PERB ¶3005 (2008), *confd and remitted on other grounds sub nom*, *Manhasset Union Free Sch Dist v New York State Pub Empl Rel Bd*, 61 AD3d 1231, 42 PERB ¶7004 (3d Dept 2009) *on remittitur*, 42 PERB ¶3017 (2009); *City of Oswego*, 41 PERB ¶3011 (2008).

a reasonable expectation among the affected unit employees that the practice would continue.

Following our review of the record and without determining whether the subject is mandatory, we find that the unequivocal nature of the practice and its uninterrupted continuation for at least ten years demonstrates that employees in the represented units had a reasonable expectation that the practice would continue.

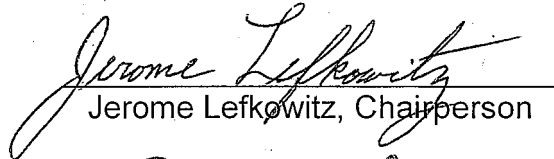
Contrary to the ALJ's conclusion, the present case is not analogous to *State of New York (Governor's Office of Employee Relations and Department of Health)*.⁴ Under the unique facts in that case, we found that the departmental practice of sponsoring an annual picnic and permitting employees to attend without charging leave accruals was conditioned on the employer's unfettered discretion, which had been codified in the DCS Time and Attendance Manual. The facts demonstrated that in prior years the department had applied its discretion when considering annual requests for an employee picnic by PEF and CSEA representatives. As a result, we concluded that the State had not unilaterally changed the practice when it applied its discretion by denying a request for a 1990 employee picnic. In light of the contours of that particular practice, the represented employees in that case lacked a reasonable expectation that the annual picnics would continue.

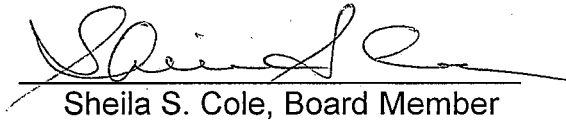
Based upon the foregoing, we reverse the ALJ's decision and remand the cases for a determination as to whether the subject of the charges is a mandatory subject of negotiations, and to decide the State's timeliness defense concerning PEF's charge.

⁴ 25 PERB ¶3005 (1992), *confd*, *Public Employees Fedn, AFL-CIO v New York State Pub Empl Rel Bd*, 195 AD2d 930, 26 PERB ¶7008 (3d Dept 1993).

Nothing in our decision precludes the ALJ, at her discretion, from reopening the record for purposes of receiving offers of proof and/or additional evidence from the parties including evidence to resolve an ambiguity in the record: whether the at-issue practice was limited to represented employees or whether the practice and the unilateral change were also applicable to nonunit employees.

DATED: October 15, 2013
Brooklyn, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Board Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

AMALGAMATED TRANSIT UNION, LOCAL 1181,

Petitioner,

-and-

CASE NO. TIA2013-023

MTA BUS COMPANY,

Respondent.

PITTA & GIBLIN LLP (BRUCE J. COOPER, of counsel) for Petitioner

PROSKAUER ROSE LLP (NEIL H. ABRAMSON, of counsel) for Respondent

BOARD DECISION AND ORDER

This matter comes to us by reason of a report and recommendation of the Director of Conciliation (Director) regarding a petition for interest arbitration filed by the Amalgamated Transit Union, Local 1181 (ATU Local 1181) under §209.5 of the Public Employees' Fair Employment Act (Act) and §205.15 of our Rules of Procedure (Rules) with respect to an impasse in contract negotiations between ATU Local 1181 and the MTA Bus Company (MTA).

In his report and recommendation, the Director concludes that a voluntary resolution of the contract negotiations between ATU Local 1181 and the MTA cannot be effected and recommends that the impasse be referred to a public interest arbitration panel.

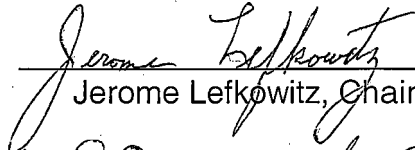
The MTA has not filed an objection to the Director's report and recommendation

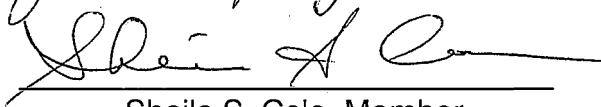
pursuant to §205.15(b) of the Rules.

Following our review of the Director's report and recommendation, we hereby certify that a voluntary resolution of the contract negotiations between ATU Local 1181 and the MTA cannot be effected and we, therefore, refer the impasse involving these parties to a public interest arbitration panel.

SO ORDERED.

DATED: October 15, 2013
Brooklyn, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member